Supreme Court, U.S.
FILED

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

La Quetta M. Golden,
Petitioner.

v.

City of Gulfport, Mississippi, et. al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Attorney and Petitioner

20 pp

QUESTION PRESENTED

Whether petitioner was discriminated against based upon her race and sex when respondents violated petitioner's federal civil rights and the equal pay act statutes since they failed to pay petitioner's salary equal to that of the caucasian male attorneys and when they terminated her employment and replaced her with a caucasian male attorney who had less experience.

PARTIES IN THE PROCEEDING

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

LA QUETTA M. GOLDEN
PETITIONER

VERSUS

CITY OF GULFPORT, MISSISSIPPI;
JIMMIE JENKINS; RICHARD ROSE;
GORDAN ALLEN, SR.; KIM SAVANT;
AND RICH DOMBROWSKI, CITY
COUNCILMEN, IN THEIR INDIVIDUAL AND
OFFICIAL CAPACITY; KEN COMBS, MAYOR,
IN HIS INDIVIDUAL AND OFFICIAL CAPACITY;
HARRY HEWES, CITY ATTORNEY, IN
HIS INDIVIDUAL AND OFFICIAL CAPACITY; AND
CAPACITY
RESPONDENTS

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EQUAL PAY ACT - 29 U.S.C. Section 201
TITLE VII of the 1964 Civil Rights Act-42 U.S.C. Section 2000e
42 U.S.C. Section 1981

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Fifth Circuit Court of Appeals in this matter filed on July 11, 1997.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix 1 to the petition and is unpublished.

The opinion of the United States district court appears at Appendix 2 to the petition and is unpublished.

The opinion of the United States court of appeals appears at Appendix 3 to the petition and is unpublished.

JURISDICTION

The United States Court of Appeals filed its judgment on July 11, 1997. App. 1. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 5, 1997, and a copy of the order denying rehearing appears at Appendix 3. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the case at bar include violations by Respondents of the Equal Pay Act (29 U.S.C. Section 201) and Title VII of the 1964 Civil Rights Acts (42 U.S. C. 2000 e) on the issues of racial and sexual discrimination.

STATEMENT

Your Petitioner alleges she was discriminated against by receiving lower wages as her male colleagues while she performed essentially the same duties having identical skills, efforts, responsibilities and work environment as her male colleagues. Petitioner further contends she was wrongfully discharged based upon her race, African-American and her sex, female.

Your Petitioner, at the time of the events complained of herein had been employed by the Respondent City of Gulfport for approximately seven months as the first female city prosecutor. Her professional training included graduation from *Thurgood Marshall School of Law* with a Juris Doctorate of Law Degree and a license to practice law in the State of Mississippi. During the course of her employment, Petitioner was the only female, only African-American within the legal department of the Defendant City of Gulfport. The Respondent City of Gulfport presently has within its legal department six Caucasian attorneys and three Caucasian judges. There aren't any female attorneys or minority attorneys working within the city's judicial system. At all times during her period of employment, Petitioner was fully qualified and competent to perform her tasks and was not the subject of any disciplinary actions. Yet, Petitioner was terminated from her employment and was replaced by a Caucasian male prosecutor who had less experience than Petitioner. Petitioner asserts that she was discriminated against by her immediate supervisor, Respondent Hewes; and the former mayor, Respondent Combs because of her sex and race and that the acts of these Respondents constituted "official policy" on behalf of Respondent City of Gulfport.

A. EQUAL PAY ACT ISSUE

Petitioner performed essentially the same job duties as her male colleagues, requiring equal skill, effort and responsibility, but was paid at a substantially lower rate of pay than her male colleagues in Respondent's legal department. (See Record, Vol. 1, pg. 87) To support her Equal Pay Act Claim, Petitioner presented the pay scale of Respondent City (See Record, Vol. I, pg. 199).

Petitioner was placed in a lower pay scale than her Caucasian male colleague. Upon her employment with Respondent City, Petitioner was placed in pay scale L which salary ranged from $33, 721-$43,138.08. Whereas, the Caucasian male attorney, James Halliday, was placed in a pay scale M which salary ranged from $38, 126.88- $48,817.44. Petitioner was placed in a pay scale with city directors who had Bachelor of Science Degrees or simply high school diplomas; whereas, Petitioner possessed a Juris Doctorate degree. Petitioner's qualifications, education and experience as an attorney should have been sufficient to place her in pay scale M along with Attorney Halliday.

Petitioner and Attorney Halliday possessed the same job title (Assistant City Attorney); both served as attorneys representing the City of Gulfport in both bench jury trials; both possessed the same educational and licensure requirements for their respective positions; both job descriptions were very similar; both jobs required the same education and experience. Petitioner was just as qualified as Attorney Halliday and had more supervisory responsibility, but received less wages. Petitioner further maintains that the other male prosecutors received less wages because they worked part-time. However, Attorney James Simpson, a part-time prosecutor, received a salary of $24, 000.00 per year. (See Record, Vol. II, pg. 542) Petitioner's salary was approximately $38,000.00 a year. Petitioner asserts that based upon a pro rata determination, if Attorney Simpson's salary was $24,000.00 per year as a part-time position, then her salary should have been comparable at $48,000.00 for serving in a full-time capacity. Attorney James Halliday's salary was approximately $42,000.00 a year which is within pay scale M.

During his depositional statement, Respondent Combs rendered several admissions. Respondent Combs admitted that Halliday's and Petitioner's skills were similar (See Record, Vol. II, pg. 569, lines 16-24). Respondent Combs further admitted that Petitioner was a qualified attorney. (See Record, Vol. II, pg. 573, lines 9-10)

Respondent Combs admitted that both Petitioner and Halliday possessed the same educational background. (Id, pgs. 562, 563, lines 20-25 a d 1-13 respectively) Finally, in Respondent Combs' sworn deposition

statement, he confirms that Petitioner's job title was essentially the same as Halliday's title (Assistant City Attorney). (See Record, Vol. II, pag. 564, lines 12-21).

Therefore, Petitioner presented sufficient evidence that she performed essentially the same job duties as her male colleagues, requiring equal skill, effort and responsibility.

In *Flory v. Salt Lake County Sheriff's Office*, 680 F. Supp. 1504 (1988) (See Record, Vol. II, pg. 575-576), this case involved a female supervisor who was paid less than her counterparts. Plaintiff alleged that the Defendants used the merit system to classify her male counterparts, and that this classification was based on gender.

The Court held that after Plaintiff pleads a prima facie case of gender discrimination in pay, Defendant has the burden of showing that disparity in wages between male and female employees is based on a valid merit system. The court defined a valid merit system as follows, to-wit:

> "must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria."

The court further held that the Fair Labor Standards Act is to be liberally construed in favor of the protected class. The purpose behind the act is to raise the wages of female workers so that their wages are the same as their male counterparts.

In the case at bar, the lower court held that Petitioner proved her prima facie case on the Equal Pay Act Claims. However, the Court further held that Respondents overcame their burden by articulating one of the four exceptions to the Equal Pay Act.

The court stated that Respondents based the pay differential on a factor other than sex. However, the factor which the court has relied upon (i.e., that the position held by Halliday has been traditional a higher paying position that the city prosecutor job) is factually incorrect. Based upon the

fact that the part-time prosecutor earned $24, 000.00 per year and Halliday earned $42,000.00 per year, the statement asserted by Respondents that Halliday's position pays more than the city prosecutor's position is factually incorrect. The inquiry becomes whether the Fair Labor Standards Act and the Equal Pay Act has been violated when a full-time prosecutor only received $38,000.00 a year; the full-time male attorney received $42,000.00 a year; and the part-time male attorney received $24,000.00 a year. Based upon these salaries, Petitioner maintains that Respondents have violated the Fair Labor Standards Act including the Equal Pay Act.

Therefore, based upon the foregoing, Petitioner strongly asserts that she has established her prima facie case of disparity in pay pursuant to the Equal Pay Act. Furthermore, the Respondents have not overcome Petitioner's prima facie evidence. Respondents have not articulated a legitimate reason for disparity in wages since Petitioner and Attorney Halliday were both full-time employees.

This issue of equal pay is of broad public importance. Females who work in these United States and more particularly within the City of Gulfport, Mississippi should believe that our judicial system will protect their rights in equal pay as afforded by federal statutes. Presently, the local Ministerial Alliance; the local chapter of the National Association for the Advancement of Colored People; and the public support Petitioner's efforts to stop discrimination against females and minorities within the city of Gulfport, Mississippi. Prior to 1993, the Respondent City has failed to hire female attorneys. Since Petitioner's unlawful termination in 1993, there hasn't been any hiring of female attorneys. This act alone violates and offends Title VII of the Civil Rights Act of 1964.

Petitioner respectfully believes a review of the issues and a reversal in the case at bar would send a strong message to a city that tolerates no diversity within its legal department.

B. RACIAL DISCRIMINATION

The United States District Court for the Southern District of Mississippi improperly denied Petitioner's claim of racial discrimination

pursuant to Title VII of the 1964 Civil Rights Acts.

In Petitioner's Amended Complaint, Petitioner alleged that she was a competent African-American female prosecutor who worked in a hostile environment. Petitioner further contended that she was not treated fairly or equally and received harsher disciplinary treatment than her male counterparts. (See Record Vol. I, pg. 81) Petitioner was the first female, first African-American to ever hold the prosecutor's position. Heretofore, all her predecessors have been Caucasian male attorneys.

The Court in its January 27, 1995 Memorandum Opinion held that Petitioner's Title VII claims should survive Defendants' Motion for Summary Judgment. (See Record, Vol. 1, pgs. 64-75) Consequently, in the court's July 25, 1996 Memorandum Opinion, the court held that Petitioner failed to establish that the proferred reason for her termination was pretextual. (See Record Vol. 2, pg. 703)

From February, 1993 until August, 1993, Petitioner performed her job as prosecutor competently and efficiently. This is evident from a letter written by Respondent Combs who wrote in July 26, 1993 stating Petitioner was doing an *outstanding* job as the city's prosecutor. (See Record, Vol. I pg. 187) This letter was written only one month prior to Respondent Hewes' August, 1993 recommendation to dismiss Petitioner for alleged *poor performance*. Respondents have failed to show what caused Petitioner's imminent termination within 30 days of receiving high commendations from Respondent Mayor Combs.

Next, Petitioner submitted her court record to rebut Respondent's allegation of poor performance. (See Record, Vol. II pg. 598) From February 1993 until August 1993, Petitioner was responsible for 70 jury trials. Of which four cases were dismissed; four not guilty verdicts were rendered and 62 cases were guilty pleas or guilty verdicts. From the city court case docket, Petition was responsible for 595 bench trials of which 81 cases were dismissed; 12 cases received not guilty verdict; and 502 cases received guilty pleas or guilty verdicts.

Petitioner attended all court appearances on both the local and appellate level during her tenure. During this time, Petitioner's supervisor, Respondent Hewes, never observed Petitioner in court and gave this admission during his deposition. Respondent Hewes further admitted in his sworn depositional statement that he terminated Petitioner based upon hearsay. (See Record, Vol. I pg. 579, lines 14-17 and Vol. I pg. 580, lines 15-24.)

The lower court itself cited *Richmond v. Board of Regents*, 957 F. 2d 595, 598 (8th Cir.1992); *Kizer*, 962 F. 2d at 612 in stating (" to meet burden of establishing a prima facie case of discriminatory discharge [Plaintiff] must show both that she was qualified for and satisfactorily performed the duties of her job.") (See Record, Vol.II, pg. 705).

Petitioner strongly contends that she has met her burden of proving and maintaining her prima facie case of racial discrimination. Petitioner has shown through sworn affidavits and sworn depositional statements of Respondent Combs that she was a qualified attorney. (See Record Vol. II, pg. 568, lines 21-25) Furthermore, Petitioner never received any derogatory evaluations indicating that her performance was unsatisfactory. Petitioner has only received commendations and high praises from Respondent Combs which again rebutted Respondents' allegations of poor performance. Conversely, Respondent Hewes did in fact render an evaluation upon Attorney James Halliday. (See record Vol. II, pg. 549-551) Mr. Halliday's performance was rated "below standard", yet Respondent Hewes did not terminate this Caucasian male attorney. Irrespective to Mr. Halliday`s poor performance rating, Respondent Hewes rewarded Attorney Halliday by recommending that this Caucasian male attorney receive a 2.5% raise (id., pg. 550)

Petitioner strongly asserts that this fact along constitutes disparate treatment in the work place. Petitioner, an African American female attorney was terminated for alleged unsubstantiated *"poor performance."* However, Attorney James Halliday was not terminated for his actual poor performance rating. Attorney Halliday received more money in salary to award his poor performance. Respondents could not articulate any legitimate justification for this type of disparate treatment.

Petitioner has sufficiently proven that she was discriminated against based upon her race.

In *Josey v. Hollingworth*, 996 F. 2d 632 (3rd Cir. 1993), the Court held that to make a prima facie showing of racial discrimination, Plaintiff must demonstrate that (1) he belongs to a racial minority; (2) he was qualified for the position; (3) he was discharged; and (4) other employees not in a protected class were treated more favorably. In the case at bar, Petitioner has met this burden.

In *Josey*, the court further stated that the Supreme Court has acknowledged that "there will seldom be eyewitness testimony as to the employer's mental processes. "Where direct 'smoking gun' evidence of discrimination is unavailable, this court has found that the proper iniquity is "whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonable could support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence necessarily leads to [the] conclusion that the employer did act for discriminatory reasons," (See *Graham v. F.B.Leopold Co.*, 779 F. 2d 170, 173 (3rd Cir. 1985)

The court further held that it has found that factors such as the defendant's credibility, the timing of an employee's dismissal, and the employer's treatment of the employee could raise an inference of pretext which would make summary judgment for the employer inappropriate.

In the case at bar, Respondent Mayor Combs wrote a letter acknowledging that Petitioner was doing an "outstanding" job in her performance. However, less than one month later, Respondent Combs signed a Notice of Termination stating Petitioner had poor job performance. The timing of Petitioner termination along with the inconsistency could raise an inference of pretext which could make summary judgment for the Respondents inappropriate. Petitioner seeks a reversal since the ruling of the lower courts are inconsistent with prior Supreme Court ruling and applicable federal statutes.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUITS

Petitioner respectfully requests this Honorable Court to grant this petition for a writ of certiorari because the ruling of the 5th Circuit Court of Appeals is in direct conflict with decisions of other circuits.

The 5th Circuit Court of Appeals and the United States district courts' dismissed Petitioner's racial discrimination claim when Petitioner had properly met her burden of proof as established by the *Josey v. Hollingsworth* and *McDonnell Douglas v. Green* cases. Furthermore, *Josey* cited the Supreme Court in rendering its conclusion that Plaintiff in *Josey* had been discriminated based upon his race.

Petitioner further maintains the lower courts erred when they dismissed Petitioner's Equal Pay Act Claim. Petitioner relied upon *Flory* to establish that she was paid less than her male colleagues for performing essentially the same job duties.

It is of national importance for the high court to render its opinion of the issues of race discrimination and sex discrimination pursuant to Title VII of the 1964 Civil Rights Act and the Equal Pay Act. Petitioner brings this action for other females in this nation and in Gulfport, Mississippi who are receiving less wages than their male colleagues and/or who were terminated based upon their race and/or sex.

Petitioner strongly asserts that Respondents failed to diversify their work force. Since Petitioner's wrongful termination, Respondents have failed to employ any African-American attorneys to its staff within the legal department. This is a very important issue since the city of Gulfport, Mississippi has within it area at least 12 percent African-American within its city; yet, no African-Americans are employed within its legal department. To maintain a segregated municipality is contrary to our United States Constitution and the other federal laws enacted to assure

fairness and equality to every citizen irrespective to their race, color, sex, national origin, creed, religion or disability.

II. THE DECISION BELOW IS INCONSISTENT WITH *MCDONNELL DOUGLAS CORPORATION VERSUS GREEN*, A UNITED STATES SUPREME COURT DECISION CONCERNING THE IMPORTANT ISSUE OF RACIAL DISCRIMINATION IN THE WORKPLACE.

Plaintiff asserts that the decision below is inconsistent with *McDonnell Douglas Corporation v. Green*, 41 U.S. 792, 802 (1973). Plaintiff must initially establish a prima facie case of discrimination, in the absence of direct proof. Also see, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981). If a prima facie case is established, the Defendants must articulate legitimate non-discriminatory reasons for Plaintiff's termination. *McDonnel Douglas*, supra; *Burdine*, supra. Thereafter, Plaintiff must prove that the reasons advanced by the Defendants are either untrue, or unworthy of belief, as to a pretext to hide, or mask, discrimination. *McDonnell Douglas*, supra; *Burdine*, supra; and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502,507 (1993); and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

To establish a prima facie case on the bases of race (African-American) and/or sex (Female), Plaintiff must establish by a preponderance of the evidence, that she: (1) is an African-American female; (2) was qualified for her position; (3) was terminated from her position and (4) was replaced with a Caucasian male who was less qualified than Plaintiff. *McDonnell Douglas*, supra; *Burdine*, supra.

In the case at bar, Plaintiff established that she was qualified for her position. Defendant Ken Combs admitted in his deposition that Plaintiff was qualified for her position. (See Record Vol. II, pg. 568, lines 21-25)

Plaintiff has proven that the reason Defendants gave for terminating her (poor performance) were pretextual in nature since: (1) Defendant Combs wrote a letter of commendation a month prior to Plaintiff's termination stating that Plaintiff was doing an *"outstanding"* job as its city prosecutor; (2) that defendants have failed to produce into evidence any adverse job evaluations against Plaintiff; (3) that defendants have failed to produce any disciplinary actions taken against Plaintiff during her tenure as city prosecutor; and (4) where plaintiff has entered into evidence her court record which rebuts the allegation of *poor performance*. (See Record, Vol. II pg. 598)

Defendants have not established, by demonstrable evidence, that in the absence of discrimination, Plaintiff would still not have been retained as the city's prosecutor. See, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Therefore, based upon the foregoing, Plaintiff has established a prima facie case of racial discrimination in the workplace.

CONCLUSION

Based upon the foregoing facts, federal statutes and case law, Petitioner respectfully requests this Honorable Court to receive this Petition for Writ Certiorari, grant a review on the issues presented and issue an opinion of reversal in accordance to the federal law. Petitioner is certainly aware that this Honorable Court has discretion to determine which cases it will review. Petitioner is not a public figure, famous, or controversial. However, Petitioner is an African-American female who believes in our United States Constitution as well as our judicial system. Petitioner believes justice shouldn't be afforded only to the famous, but to the ordinary hard working citizens of these United States. Plaintiff further believes that ultimate justice *shall* roll down like waters and righteousness like a mighty stream!

Therefore, Petitioner seeks justice for herself and other female attorneys desiring to work for Respondent city of Gulfport, Mississippi. Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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Attorney and Petitioner

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

La Quetta M. Golden, Plaintiff - Appellant

v.

City of Gulfport, et. al. - Defendants - Appellees

Case No. 96-60562

ORDER, dated July 11, 1997, Before Politz, Chief Judge, Higginbotham and Smith, Circuit Judges

This matter is before the court on appeal by La Quetta M. Golden of an adverse summary judgment dismissing her Title VII, Equal Pay Act, racial and sexual discrimination and retaliatory discharge claims. Having considered the oral arguments, briefs of counsel, and pertinent parts of the record, and finding neither legal nor factual basis for any claim asserted by appellant, the judgment appealed is AFFIRMED at appellant's costs.

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* Pursuant to5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circ. R. 47.5.4.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OFMISSISSIPPI
SOUTHERN DIVISION

La Quetta M. Golden, - Plaintiff

v.

City of Gulfport, et. al. - Defendants

Civil No. 1:96cv409GR

ORDER, dated July 25, 1996, Walter Gex,
United States District Judge

This cause is before the Court on motion of the defendants for summary judgment [98-1] pursuant to Rule 56 of the Federal Rules of Civil Procedure. Pursuant to the Memorandum Opinion entered in this cause, this date, incorporated herein by reference, it is hereby,

ORDERED AND ADJUDGED that the defendants' motion for summary judgment [98-1] be, and is hereby, granted; and that this case be, and is, dismissed. It is further,

ORDERED AND ADJUDGED that the parties shalleach bear their respective costs.

SO ORDERED AND ADJUDGED this the 25th day of July, A.D., 1996.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

La Quetta M. Golden, - Plaintiff - Appellant

v.

City of Gulfport, et. al. - Defendants - Appellee

Case No. 96-60562

ORDER, dated August 5, 1997, Before POLITZ, Chief Judge Higginbotham and Smith, Circuit Judges

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

Supreme Court, U.S.
FILED
APR 23 1998
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No. 97-1599

In The Supreme Court of the United States

OCTOBER TERM 1997

LA QUETTA M. GOLDEN,

Petitioner,

v.

CITY OF GULFPORT, MISSISSIPPI, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming summary judgment on petitioner's Equal Pay Act claim that as Assistant City Attorney (Prosecutor) she should have been paid the same as Jim Halliday, a male Assistant City Attorney.

2. Whether the Court of Appeals erred in affirming summary judgment on petitioner's Title VII claim that her employment was terminated because of her race.

PARTIES TO THE PROCEEDING

The District Court, by Memorandum Opinion of January 27, 1995 and Order of February 16, 1995, dismissed petitioner's Title VII claims against the individual defendants in their individual capacities; Record 64-74; 96-97. On February 10, 1995, plaintiff filed an Amended complaint in response to the Court's Order; Record 76. Unlike the initial Complaint, which sued defendants Jenkins, Rose, Allen, Savant, and Dombrowski in their individual and official capacities, the Amended Complaint sued them in their official capacities only. Only defendants Combs and Hewes were still sued in their individual capacities. By Order of August 15, 1995, Record 279, the Court dismissed petitioner's claims against respondents Combs and Hewes in their individual capacities, except for Equal Pay claims. Petitioner did not address the issue of individual liability in her appeal to the Court of Appeals, but her Petition nonetheless lists all the individual respondents in their individual capacity.

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REASONS FOR DENYING THE WRIT

I. The Court of Appeals did not err in affirming summary judgment on petitioner's Equal Pay claim.

A. Plaintiff could not carry her burden of showing that she and Jim Halliday performed equal work requiring equal skill, effort, and responsibility.

Petitioner spent about 90 percent of her time in court, and ten percent on administrative duties. Exh. A, Golden Depos., Supp. Record 27, 28. Her court responsibilities were limited to misdemeanor cases in City and County Court. In petitioner's words, "[t]hey were not difficult trials." Exh. A, Golden Depos., Supp. Record 76. At trial, petitioner followed a checklist of questions and procedures developed by other prosecutors; Exh. J, DUI Prosecution Checklists, Supp. Record 150-159; Exh. A, Golden Depos., Supp. Record 59, 87, 88. Discovery was very limited; Exh. A, Golden Depos., Supp. Record 87; Exh. K, Uniform Rules of Procedure in Mississippi Municipal Courts, Supp. Record 160-164. Respondents' discovery requests were generally handled by the Court Clerks, and the prosecutors used form requests. Exh. A, Golden Depos., Supp. Record 82-86.

Petitioner handled no civil litigation. Exh. A, Golden Depos., Supp. Record 29. While petitioner spent 90 percent of her time in court, Jim Halliday spent about 60% of his time representing the City of Gulfport in civil suits in state and federal court. Exh. A, Golden Depos., Supp. Record 28; Halliday Affid., Record pp. 531-532. Mr. Halliday was responsible for complex litigation under a variety of statutes and Constitutional provisions. It required extensive investigation,

legal research, and use of all the discovery available under the Mississippi Rules of Civil Procedure and the Federal Rules of Civil Procedure. Trial preparation generally took years, and the amount of money at issue was usually in the millions. Halliday Affid., Record 531-532.

Apart from litigation, petitioner devoted the remaining ten percent of her time to administrative duties, consisting of interviewing, hiring, and orienting her secretary; assigning cases to prosecutors; visiting area schools; and conducting tours of City Hall. Exh. A, Golden Depos., Supp. Record 23-25. Mr. Halliday's non-litigation duties occupied about 40 percent of his time, compared to petitioner's 10 percent. He represented the City in its workers' compensation claims and in Civil Service proceedings. He drafted ordinances, and gave legal advice to the City's Risk Manager and to all the City's departments. He taught in the Police Academy. Halliday Affid., Record 531-532,; Exh. A, Golden Depos., Supp. Record 28. Petitioner performed none of these duties. Exh. A, Golden Depos., Supp. Record 29-30, 38.

In view of the substantial differences between their jobs, Petitioner cannot show that they were substantially equal. Instead, she claims that Mayor Combs "confirms that petitioner's job title was essentially the same as Halliday's title (Assistant City Attorney)". In the passage cited by petitioner, Mayor Combs said no such thing. He insisted that petitioner's title was "Assistant City Attorney (Prosecutor)" despite the best efforts of petitioner's counsel to get him to testify that her title, like Mr. Halliday's, was "Assistant City Attorney." Even if "Assistant City Attorney" were the same job title as "Assistant City Attorney (Prosecutor)" that would not excuse petitioner from carrying her burden of showing equal work; *see, e.g.*,

Christopher v. State of Iowa, 559 F.2d 1135 (8th Cir. 1977)("It is to be noted at the outset that the consideration of equal pay standards is based on actual job requirements and performance, and not on job classification or titles"). While petitioner asserts that her job description was "very similar" to that of Mr. Halliday, the descriptions do not appear in the record, and cannot carry her burden in any event; *see, e.g.*, *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719, 724 (5th Cir.1970)("As to the job descriptions, the Trial Judge was clearly correct to place her reliance elsewhere. The controlling factor under the Equal Pay Act is job content - the actual duties that the respective employees are called upon to perform").

Petitioner asserts that respondent Combs "admitted that Halliday's and Petitioner's skills were similar" and that they "possessed the same educational background." Even if this were true, "a prima facie case is not made by showing that the employees of opposite sex possess equivalent skills. The statute explicitly applies to jobs that require equal skills, and not to employees that possess equal skills. . . . The only comparison of skills that should be made in a prima facie case is a comparison of skills required by a job; *Hein v. Oregon College of Education*, 718 F.2d 910, 914 (9th Cir.1983); *see also, Waterman v. New York Telephone Company*, 102 Lab. Cas. ¶34,654, 1984 WL 1482 (S.D.N.Y. 1984)("Plaintiffs ... have not ... met their Rule 56(e) obligation by bringing to this Court's attention any affirmative indication that the jobs in question are equal or substantially equal. The argument that 'there is no indication' the training or experience of clerical instructors is 'in any way inferior to [that] of technical instructors' ... or that 'the courses in the 2000 series are in any way academically inferior to those in the other series' ... is simply beside the point"). Moreover, what Mayor Combs actually testified about skills

was,

> I'm not being flip, but we've got four attorneys sitting at the table here. And all of y'all have skills similar to Johnny Cochran and Shapiro, but I don't think any of y'all are making the kind of money they are. Naturally, if you're talking about two people that are attorneys and ask the question, are their skills similar, the answer is yes.

Combs Depos., Record 569.

B. Respondents have shown that the differential between petitioner's pay and that of Jim Halliday was based on a factor other than sex.

All of Gulfport's City Prosecutors, male and female, have been paid less than the Assistant City Attorney. In fact, all of the male City Prosecutors have been paid less than petitioner for doing the *same* City Prosecutor work. Petitioner claims, nonetheless, that the City violated the Equal Pay Act by failing to pay her as much as the Assistant City Attorney. Exh. A, Golden depos, Supp. Record 31, 32.

Petitioner was the first full-time prosecutor for the City of Gulfport. Before she was hired, the work of the prosecutor's office was handled by part-time prosecutors. The three part-time prosecutors who were on board when she was hired, and who had been responsible for all of the functions she performed after she was hired, were Wes Teel, Jim Simpson, and Mark Strickland. Mr. Teel, who as Senior Prosecutor handled scheduling and other administrative functions for the prosecutors, was paid $750.00 semi-monthly for a twenty hour

workweek. Jim Simpson and Mark Strickland were paid $500.00 semimonthly for a twenty hour workweek.[1] Teel Affid., Record 529-530; Exh. D-1, Employment Histories, Supp. Record 123-131.

Before petitioner was hired, the prosecutors' workload had increased to the point that they were working twenty-five to twenty-eight hours per week. None of the prosecutors was given any secretarial support by the City; they provided their own, at their own expense. They were eligible for no fringe benefits except retirement. Teel Affid., Record 529-530; Hewes Affid. Record 533-535.

Petitioner was hired effective February 16, 1993 at $1475.52 semimonthly. Her fringe benefits included retirement eligibility, plus paid vacations, holidays, and sick leave, and medical and life insurance. She generally worked a forty hour workweek, from 8:00 to 5:00, Monday through Friday. Exh. A, Golden depos, Supp. Record 23, 26, 38; Hewes Affid., Record 533-535; Exh. D-1, Employment Histories, Supp. Record 123-131. She was paid more than twice as much, not even counting fringe benefits, as the three male prosecutors who had performed the functions she assumed when she was hired, even though her hours were less than twice what the part time prosecutors had devoted to the job.

After petitioner was hired, the backlog of cases was such that two of the part-time prosecutors, Wes Teel and Jim Simpson, continued to work at least twenty hours per week throughout her employment, and were paid $625.00

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[1]. Mr. Simpson's pay was temporarily raised to $1238.63 semi monthly when he filled in for Jim Halliday during his illness.

semimonthly, still with no fringe benefits. Teel affid., Record 529-530; Exhibit D-1, Employment Histories, Supp. Record 123-131. Accordingly, while petitioner's workweek was approximately twice theirs, she was paid more than twice as much. With her hire, the City's total cost for prosecutor salaries rose from $1750 semimonthly to $2725 semimonthly, not counting fringe benefits, plus the salary of petitioner's secretary.

After petitioner was discharged, the work that had been done by petitioner, Mr. Teel and Mr. Simpson was performed by Mr. Teel and Mr. Simpson, with the temporary assistance of a third part-time prosecutor, William Bethea. Teel Affid., Record 529-530. The salaries of Mr. Teel and Mr. Simpson were raised from $625 to $1000 semimonthly (a raise of $375), and Mr. Bethea was paid $625.00 semimonthly. Exh. D-1, Employment Histories, Supp. Record 123-131. While petitioner had been paid $1476 semimonthly, the raises given to the two part-time prosecutors to pick up her duties, plus the salary of the additional part-time prosecutor hired for this period, came to only $1375, and she was paid fringe benefits while they were not. The total cost of prosecutor salaries, which had been $2725 semimonthly plus fringes, dropped to $2625 semimonthly without fringes when assumed by three male part-time prosecutors. This cost dropped even though the prosecutors faced a backlog of cases due to Judge Gaston Hewes' recusal and Judge Danny Guice's illness, and an influx of cases due to the Orange Grove annexation to the City of Gulfport.

When Steve Miller was hired to replace petitioner as full-time prosecutor, he was paid $1405.05 semimonthly, lower than petitioner's $1475.52 rate. Exh. D-1, Employment Histories, Supp. Record 123-131.

Petitioner asserts that "Jim Simpson, a part-time prosecutor received a salary of $24,000." She fails to mention that Mr. Simpson's salary was raised to this amount during the period when petitioner had been terminated and Mr. Simpson, among others, assumed her duties. After petitioner was discharged, the work that had been done by petitioner, Mr. Teel and Mr. Simpson was performed by Mr. Teel and Mr. Simpson, with the temporary assistance of a third part-time prosecutor, William Bethea. Teel Affid., Record 529-530, These part-time prosecutors had to cover the work they had been doing while petitioner was employed, plus her work. The workload was further inflated by a backlog of cases due to Judge Gaston Hewes' recusal and Judge Danny Guice's illness, and an influx of cases due to the Orange Grove annexation to the City of Gulfport. As a result the hours put in by these part-time prosecutors, who had worked at least twenty hours per week while petitioner was employed, returned to the levels they had worked before she was hired - about 25 - 28 hours per week. Teel Affid., Record 529-530. When petitioner was terminated, the salaries of Mr. Teel and Mr. Simpson were raised from $625 to $1000 semimonthly (a raise of $375), and Mr. Bethea was paid $625.00 semimonthly. While petitioner had been paid $1476 semimonthly, the raises given to the two part-time prosecutors to pick up her duties, plus the salary of the additional part-time prosecutor hired for this period, came to only $1375, and she was paid fringe benefits while they were not. Exhibit D-1, Employment Histories, Supp. Record 123-131. The total cost of prosecutor salaries, which had been $2725 semimonthly plus fringes, dropped to $2625 semimonthly without fringes when assumed by three male part-time prosecutors.

Petitioner cites *Flory v. Salt Lake County Sheriff's*

Office, 680 F. Supp. 1504 (D. Utah 1988) in a discussion of the "merit system" defense, but respondents summary judgment motion did not rely on a merit system defense. The only reference petitioner makes to the defense at issue - factor other than sex - is to cite the fact that Jim Halliday made $24,000 per year as a part time prosecutor. She fails to mention that Mr. Halliday became a part-time prosecutor in July, 1995, when he replaced Jim Simpson in that job. This was a full two years after petitioner's termination, and it is not valid to assume that pay levels would remain static, even if work loads had remained the same. For example, Steve Miller, who replaced petitioner, had received two raises by that time, and Mr. Halliday four. Exhibit D-1, Employment Histories, Supp. Record 123-131. Comparisons such as the one petitioner wishes to make were rejected in *Brennan v. Victoria Bank and Trust Company*, 493 F.2d 896, 900 (5th Cir. 1974), explaining, "a meaningful comparison of the salaries paid the males and females, to say the least, is difficult because there was never more than one person at a time holding the exchange teller job. Consequently, the salaries sought to be compared existed at differing intervals of time, under varying price levels applicable at any particular point." *See also, Behrens Drug* at 1049 "the Equal Pay act applies to jobs held in *immediate* succession, as well as simultaneously" (emphasis added). Steve Miller, petitioner's immediate successor as full-time prosecutor, was hired at $1405.05 semimonthly, lower than petitioner's $1475.52 rate. Exh. D-1, Employment Histories, Supp. Record 123-131.

II. The Court of Appeals did not err in affirming summary judgment on petitioner's Title VII claim that she was terminated because of her race.

Respondent Harry Hewes, Gulfport City Attorney, was

petitioner's immediate supervisor. On August 23, 1993, Mr. Hewes issued a Notice of Termination that said, "Mrs. Golden is a probationary employee and has refused to accept assistance and to respond to counsel by the City Attorney to enable her to adequately perform the duties demanded of the full time Prosecuting Attorney for the City of Gulfport." An attached memorandum set out specifics. Hewes Affid., Record 610; Exhibit B-1, Notice of Termination with attached memoranda, Supp. Record 93-101. The record is replete with evidence of petitioner's poor performance, to which petitioner responded not by showing pretext but by arguing that she was right and everyone else wrong. For example, after receiving outraged complaints from a number of police officers that petitioner was negotiating plea bargains and dismissing cases without their input, Mr. Hewes issued an April 14, 1993 Memorandum Concerning the Work of the Prosecuting Attorneys' Division of the City Attorneys' Office. It said, "[e]ach of the present staff shall have equal decision-making authority in handling of cases to which they are assigned.... As full time prosecutor, the City Prosecuting Attorney shall be the administrator of the Prosecuting Attorneys' office. Matters of policy shall be discussed by all of the prosecutors, and upon recommendation shall be subject to final approval by the City Attorney. Exh. B-2, Supp. Record 102-106. Petitioner felt that Mr. Hewes, although her supervisor, had no authority to issue this directive; "[h]e didn't have such authority because I, as an attorney, am licensed by the State of Mississippi, which gives me independent professional judgment, that I was supposed to exercise my professional independent judgment, and no one should limit that authority." Exh. A, Golden Depos., Supp. Record 66. Petitioner thought Mr. Hewes should "cooperate with me and allow me to run the department. You know, that-- that was what I was hired to do, and he-- It appears every week he

would-- or every month when we met, he would come to me with some unfounded complaint from some disgruntled police officer, and I would give my explanation, and I thought it would be the end of it, and it was not." Exh. A., Golden Depos. Supp. Record 34.

Petitioner had the same attitude, and corresponding problems, with the Judges who presided over her cases. She said Judge Eric Geiss called her to his chambers after presiding over an evening of her trials, and admonished her, "Ms. Golden, we have some police officers who are very upset with you, and we cannot handle these cases like this, and I want you to explain to me what you did." She responded, "Judge, if there is anything you would like to say to me, please see me in the morning privately because I am not going to tolerate a verbal lynching," and she left; Exh. A, Golden Depos., Supp. Record 39-40. Petitioner also testified, "Judge Geiss came to me. He said, you know, 'Can you just bring - start bringing all your cases before me and not dismiss any cases? Don't dismiss any cases.' And my response to him was 'Well, Judge, I don't dismiss cases. I don't have that authority to dismiss cases. You dismiss cases.' And that was the end of that conversation." Exh. A, Golden Depos., Supp. Record 60.

Petitioner testified that Judge Gaston Hewes expected her to submit court orders the next day after a jury trial, and she described her response:

> So I told Judge Hewes, I said, "Well, Judge, you know, as long as I get the court orders to you prior to the expiration of the court term, you know, I'm not in violation of any law. Can you explain to me why you want these orders the very next day when I have jury

trials scheduled day after day after day?"

Exh. A, Golden Depos., Supp. Record 61.

Petitioner produced no evidence that the reasons given for her termination were pretexts for race discrimination. She cites a July, 1993 letter from respondent Mayor Combs. The fact that Mayor Combs at one point complimented petitioner's performance does not make it discriminatory for him subsequently to determine that it was unsatisfactory. *See, e.g., Billet v. Cigna Corp.*, 940 F.2d 812, 826 (3rd Cir. 1991) ("... prior good evaluations alone cannot establish that later unsatisfactory evaluations are pretextual"); *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 528 (3rd Cir. 1992) ("Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations"). In fact, since petitioner was African-American and female when the Mayor complimented her performance, his compliment is strong evidence that some factor *other* than race or sex was the basis for his later determination that her performance was unsatisfactory.

Petitioner also cites her own compilation of her court record. Even assuming the accuracy of her compilation, however, it proves nothing without evidence that it met respondents' expectations in the areas cited in her Notice of Termination. For example, the compilation does not address the concern cited in her Notice of Termination that the "rate of convictions, especially in DUI cases has reduced drastically during the period in which Mrs. Golden has served as Prosecutor." It makes no comparison of conviction rates. Although the Notice of Termination cited her for her continuing

propensity to "plea bargain DUI cases without thorough input from and over the objection of the police officers involved," petitioner's compilation does not distinguish between guilty pleas and guilty verdicts. It does not show how many guilty pleas were made as part of a plea bargain, what the plea bargain was, or whether the plea bargain was made with the input of the police officers involved. Since petitioner's compilation offers no comparison of her own performance to that of other prosecutors, it is irrelevant to the issue of whether she was treated differently from them because of her race or sex.

Petitioner complains that her supervisor never observed her in court and terminated her based upon hearsay. Respondents' evidence of petitioner's poor performance, however, is offered to articulate their motivation in discharging petitioner, not to prove the truth of the matters asserted; *see, e.g., Wallace v. Tech University*, 80 F.3d 1042, 1048, n.4 (5th Cir. 1996) ("Dickey's affidavit alleges specific instances of Wallace's refusals to follow directions and his questioning of Dickey's judgment. Wallace attacks Dickey's affidavit as being improperly based on hearsay. Although some of Dickey's specific examples may not be based on his personal knowledge of the events, Dickey does not offer those incidents for the truth of the events, but rather, he offers his belief that these incidents occurred as proof of his motive for failing to renew Wallace's contract. Accordingly, those statements are not hearsay. *See* Fed.R.Evid. 801(c)"). Employers are not required to manage their workforce in accordance with the Federal Rules of Evidence. *See, e.g., Waters v. Churchill*, 511 US , 128 L. Ed. 2d 686, 700 (1994)("[E]mployers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores. Such reliance may sometimes be the

most effective way for the employer to avoid future recurrences of improper and disruptive conduct. What works best in a judicial proceeding may not be appropriate in the employment context. If one employee accuses another of misconduct, it is reasonable for a government manager to credit the allegation more if it is consistent with what the manager knows of the character of the accused. Likewise, a manager may legitimately want to discipline an employee based on complaints by patrons that the employee has been rude, even though these complaints are hearsay").

In any event, many of the deficiencies Mr. Hewes cited in the Notice of Termination (Exh. B-1, Supp. Record 93-101) were based on or corroborated by his own personal observations. For example, the Notice said, "Mrs. Golden is a probationary employee and has refused to accept assistance and to respond to counsel by the City Attorney to enable her to adequately perform the duties demanded of the full time Prosecuting Attorney for the City of Gulfport."[2] The Notice also cites the incident in which petitioner refused to obey an order from a County Court Judge to appear in court, an incident in which Mr. Hewes was forced to become personally involved: "On one occasion she refused to appear in Court when requested by the Judge to appear, and only appeared reluctantly after being ordered to appear by the undersigned as her Supervisor. This lack of submission to authority in my opinion reflects badly on the City of Gulfport, and creates an atmosphere with the Court and her superiors that affects her ability to perform her duties for the City of Gulfport." When

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[2]. Mr. Hewes' observation in this respect is emphatically corroborated by plaintiff's own deposition testimony; she did not, and does not, accept counseling.

this Judge subsequently recused himself from all cases handled by petitioner, Mr. Hewes did not need hearsay to assess the consequences, since this Judge was the only one available to hear the City's cases in County Court at the time.

Petitioner complains that she "never received any derogatory evaluations indicating that her performance was unsatisfactory." She cites nothing in the respondent City's policies or practice that requires evaluations on probationary employees such as herself, and she offers no evidence to link respondents' alleged failure to evaluate her to her race. Moreover, her performance was assessed in Harry Hewes' August 23, 1993 Memorandum to Personnel Department Hewes Affid., Record 610; Exh. B-1, Notice of Termination with attached memoranda, Supp. Record 114. It was in fact Mr. Hewes' assessment of her performance that precipitated her termination. Petitioner was well aware of Mr. Hewes' dissatisfaction with her performance; she testified in her deposition that "every week he would - or every month when we met, he would come to me with some unfounded complaint from disgruntled police officer, and I would give my explanation, and I thought it would be the end of it, and it was not." Exh. A, Golden Depos., Supp. Record 34. She continued, "during our monthly meetings, Harry would tell me, 'Well, this police officer is upset for what you did.'" Exh. A, Golden Depos., Supp. Record 37. She complained that Mr. Hewes held her responsible for a case that was dismissed because discovery had not been answered. Exh. A, Golden Depos., Supp. Record 36. The only "commendations and high praises from Respondent Combs" cited by petitioner is his July 26 letter, discussed above. Moreover, Mayor Combs was not respondent's immediate supervisor and not responsible for evaluating her performance; Harry Hewes was.

Petitioner cites an evaluation done on James Halliday for the year 1994. To establish disparate treatment, petitioner "must show that white employees were treated differently under circumstances 'nearly identical'" to hers; *Mayberry v. Vought Aircraft Company*, 55 F.3d 1086, 1090 (5th Cir. 1995); *see also, Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 96, 97 (5th Cir. 1991)("To establish a claim of disparate treatment, Little must show that Republic gave preferential treatment to a younger employee under "nearly identical" circumstances"); *Smith v. Wal-Mart Stores, Inc.*, 891 F.2d 1177, 1180 (5th Cir. 1990)("In order for her claim of disparate treatment to succeed under Title VII, Smith would have to show that Cudd and she had been similarly situated. [T]o this end Smith's burden is to show 'that the misconduct for which she was discharged was nearly identical to that engaged in by a male employee whom [the company] retained'").

One reason petitioner cannot show that Jim Halliday was treated differently under "nearly identical" circumstances is that she was a probationary employee, while he was not. The City's employee handbook, a copy of which is supplied to all employees when they are hired, notifies new employees of their probationary status and what that entails; Record 633-636, Employee Handbook. Petitioner signed an "Acknowledgment of Employment Conditions," Record 638, acknowledging her probationary status and its ramifications. Jim Halliday, hired in 1990, was long out of his probationary period. Exhibit D-1, Employment Histories, Supp. Record 123-131. This in itself precludes petitioner from establishing that she was similarly situated to Mr. Halliday. *See, e.g., Cooper v. City of North Olmstead*, 795 F.2d 1265, 1270-71 (6th Cir. 1986) ("A probationary period of employment permits a company to weed out or eliminate undesirable employees. ... Probationary bus

drivers therefore do not stand on equal footing with permanent drivers, and cannot be considered to be similarly situated"). It is not respondents' burden to show that Mr. Halliday was not similarly situated to petitioner; under the cases cited *supra* it is petitioner's burden to show that they were. Petitioner makes no attempt whatever to do so; she simply submits his evaluation and notes that he was not terminated. Mr. Halliday's evaluation cannot carry petitioner's burden. Petitioner's Notice of Termination (Exhibit B-1, Record 93-101) cited examples of a "growing inability" to handle her cases and "numerous complaints concerning ineptness in presentation of facts and law before the Court by the Prosecutor on both the City and County Court levels." Mr. Halliday's evaluation specifically acknowledged that Mr. Halliday had "the ability, skills, knowledge and experience to attain a high level of performance as Assistant City Attorney," and gave him a standard rating in four of five categories - knowledge, utilization of time, initiative and judgment, and quality of work. While petitioner's Notice noted that the "rate of convictions, especially in DUI cases, has reduced drastically during the period in which Mrs. Golden has served as Prosecutor," Mr. Halliday's Evaluation indicates no problem with the outcome of his cases. Petitioner's Notice said that she "continues to plea bargain DUI cases without thorough input from and over the objection of the police officers involved", and that her ability to "communicate with the police officers involved was never satisfactory, and now has broken down to the point where Judge Geiss, Municipal Judge is unable to hear cases timely, and has found it necessary to continue cases that he deemed too serious to dismiss or reduce due to the failure or inability of the Prosecutor to properly prosecute the cases. The morale of the Police Department and the administration of justice in the Gulfport Municipal Court has been severely affected." Mr. Halliday's evaluation cites no such

problem in his relationship with any of the departments he served, much less a problem of such severity as to affect the administration of justice. Petitioner's Notice cited complaints that petitioner showed "lack of respect for the Court" and the fact that due to a conflict with petitioner, the only judge available to hear the City's cases in County Court had recused himself. Mr. Halliday's Evaluation cites no such crisis.

Mr. Halliday's rating gave him a below standard rating in only one category out of five: "punctuality/attendance, dependability & cooperation," and called for "a change of priorities and work habits." If that criticism was sufficient on its face to make him similarly situated to petitioner, then *any* criticism would suffice, and to be nondiscriminatory *any* criticism of a white or male employee would have to result in his termination. That is not the law; *see, e.g., Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 531 (3rd Cir. 1992) ("A plaintiff does not establish pretext, however, by pointing to criticisms of members of the non-protected class, or commendation of the plaintiff, in categories the respondent says it did not rely upon in denying promotion to a member of the protected class").

CONCLUSION

Plaintiff has suggested no way in which the Court of Appeals has deviated from established law, and no conflict among the circuits on any issue presented by her petition. She has shown no error by the Court of Appeals. Accordingly, her Petition for Certiori should be rejected, with costs assessed against her.

Respectfully submitted,

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